No. 12689

United States
Court of Appeals
for the Ninth Circuit

SHEFF WHITE, ORLAND WHITE and JOE M. WHITE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS REPLY BRIEF

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Appeals from the United States District Court, for the District of Oregon.

INDEX TO AUTHORITIES

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In replying to Respondent's brief, we shall follow the order of their argument as closely as possible. Respondent opens its argument by charging us with erroneous statements of fact in our brief. We reply to the glaring charges.

Respondent charges (p. 8 Res. Br.) "Error No. 1." This assertion deals merely with the terms "wall" and "bank" which were used interchangeably. Neither a "wall" or "bank" was built. (Terhune Tr. 277). Oscar G. Boden was testifying about what the plans and specifications called for, and not what happened. (Tr. 535)

Error No. 2 (p. 8 Res. Br.) regarding whether the lower bank was in fill.

We point to the testimony of R. J. Newell, the defendant's area manager and Chief Engineer when

the project was constructed, (Tr. 467-68) quoted P. 161 of our appendix.

> "A. (By Mr. Boden) That is basically the purpose."
>
> And Mr. Newell (Tr. 496-97)
>
> "Do you think that by putting in the core wall as Mr. Terhune testified was put in you have cut off the seepage through the side of the canal?
>
> A. I think so.
>
> Q. That would lead to the other conclusion, that if a core wall of the same type was put in to start with you would perhaps not have had any seepage through it?
>
> A. I think that is correct."

The second break was caused by not extending the core wall far enough.

> "A. I have an opinion that it was not caused by the overflow but that the repair did not reach far enough downstream in the first case." (Newell Tr. 496-7)

Reference is made to the testimony of Mr. Boden and Mr. Newell "That wherever porous material was encountered, it was removed and replaced by fine select material."

These witnesses testified to a theory, not as to what was done at this point. Mr. Boden was testifying from field notes made before any construction was performed. (Tr. 543-44-45) and would not show the presence of porous areas and he had no recollection of surveying or other record indicating whether or not any porous spots or areas had been encountered. (Tr. 544-45). On the other hand Mr. Gordon (Tr. 658 App. 129), Mr. Newell, Mr. Carter (Tr. 571, App. 113-14) testified that the break was caused by water seeping through the bottom and sides of the canal indicating extreme perosity. These were all defendants engineers and their testimony thoroughly cor-

roborated appellants engineer's Mr. Merritt. (Tr. 343)

Error No. 4 (Res. Br. 11) challenges the presence of seeped areas close to the bank of the canal. We call attention to the uncontradicted testimony of the appellant's witnesses, Matherly (Tr. 125-29, App. 146), Hawkins (Tr. 138-39, App. 148-49-50), George Hust (Tr. 171-72, App. 150). Mr. Carter one of defendant's engineers testified that the farmers ditch at places was 5 feet from the toe of the canal "other places it was maybe 20 feet away. It didn't exactly follow the toe of the bank." (Tr. 579-81, App. 156)

Also the testimony of appellants witness John Turner (Tr. 187-89, App. 151-52) and Ben Shaw (Tr. 200-201, App. 153-54).

Judge Fee was of the opinion that:

> "It was unquestionably proved that there were structures near the canal which were pervious to water, and that these were saturated at the time of the break." (93 Fed. Sup. 783-84)

Error No. 5 (Res. Br. 5), here counsel complains of "One of the most grevious and patently incorrect statements is appellants repeated allegation that there was a total lack of inspection of the area in which the break in the north canal occurred."

We treated this matter at page 71 et seq. of our opening brief. We failed, however to point to the whole record or to do justice to the authorities.

Other than the two occasions upon which Mr. Spofford, who was in charge of the maintenance of the canal (Tr. 689-690) walked through the canal bed in the fall of 1944-45 (Tr. 713-716, app. 136-138) the records show no other inspection except the observation of the ditch rider Mr. Pettett (Tr. 757-764) whose inspection consisted of driving a car along the roadway on top of the ditch. (Tr. 761)

Mr. Pettett, who was relied upon for inspection, was

an employee of the Owyhee Irrigation District (Tr. 757) whose duty was to deliver water to the individual farmers in addition to dividing the water among the farmers. (Tr. 758)

There is no claim that Mr. Pettett has any special training as an engineer, or possesses any qualifications to enable him to judge the security of the structure, or that he ever made any inspection upon which he could judge the safety of the canal.

The ditch riders are selected from available farmers, *not trained engineers.*

Mr. Spofford testified: (Tr. 695)

> "Q. How do you select these men?
> A. Well, these men, we try to get qualified men, and preferably men that are farmers and understand farming."

As we said in our opening brief evidence of a leak or seep would not show up along the *top of the canal* where Mr. Pettett traveled. Even if capable he should have made his inspection from a point where a defect was discernible.

The duty of inspection is an absolute duty, to be actually made by persons competent to perform that duty. *Thompson Commentary on the Law of Negligence* Vol. 4, Sec. 3791-3792, *Northern Pacific R. Co. vs Peterson* 162 U.S. 346, 16 Sup. Ct. 843, *Western Union Tel. Co. vs Treny* 114 Fed. 282.

In *Lafayette Bridge Co. vs Olsen* 108 Fed. 335 (7 C.C.A.) the sufficiency of a plank to sustain pressure was involved. We read: (341)

> "It was chargeable with such knowledge as a proper inspection would have given. The defect may not have been obvious to the untrained eye and the unskilled laborer, or to the foreman, but to one experienced in woodcraft, as the evidence shows, the defect might have been discovered, and,

> if discernable, the master is chargeable with the knowledge which the inspection would have given."

The court based the adequacy of the inspection on a false premises. We read from the opinion: (93 Fed. Sup. 785)

> "The only question involved is whether it was sufficient to have a person ordinarily skilled in irrigation problems to make such inspection or whether it was necessary to have an inspection by a competent engineer who would make appropriate tests."

This is answered, contrary to the Court's finding, by *Suko vs Northwestern Ice Co.* 166 Or. 557, 113 Pac. (2) 209, and the Lafayette Bridge Co. case supra.

And there is no question about the lack of skill of the inspectors.

The inspection was not made by persons "ordinarily skilled in irrigation matters" but by men selected because "They are farmers and understand farming." (Spofford Tr. 695)

Erros No. 6, 7 and 8. (Res. Br. 13-16)

Since counsel makes the same argument in each of these assigned errors we shall content ourselves with a single answer to both specifications. They have to do with the relation between the first repair and the second break. The over-flow or over-topping of the canal after the first repair was proven and tending to show negligence in overloading the canal before it was repaired to a point where it would carry the water without a great strain on the incomplete portion. Counsel say:

"There was no casual connection between the condition of the repair and the second break."

We treated this question rather thoroughly at P. 65 et seq. of our first brief and believe that the record referred to there clearly demonstrates negligence.

The second break occurred immediately downstream from the first break. (Terhune Tr. 264)

This places the second break very close to the first repair. In point of time they were still working on the repair of the first break when the second break occurred. (Gordon Tr. 616-17) Having knowledge of the water soaked condition of the canal bed at the point of the first repair no inspection was made beyond that point yet exactly the same condition existed. (Gordon 677)

The condition of the canal at that point is shown by Mr. Gordon's testimony. (Tr. 647)

So, we have from defendant's witnesses the following facts, a partial repair following the first break, the canal bed eroded, some three feet below the normal bed for a hundred to a hundred and fifty feet downstream, and past the point of the second break.

With no inspection of the canal bed in the eroded area the defendant's employees released sufficient water to overflow the canal, and while the machines were still working to stop the overflow, the second break occurred.

There was gross negligence in the following respect:

1. Knowing the water soaked condition at the first break no inspection was made to determine the condition immediately adjoining the first repair.

2. Releasing water into the unfinished canal without making an inspection.

3. Releasing into the canal, in that condition more water than it could contain, thus placing a greater pressure on the canal than it would sustain.

When the first repair was made, the defendant knew that no core wall had been constructed in the old bank but they placed a core wall in the new bank. The first repair work gave notice of the porous nature of the structure showing necessity of a core wall and yet no

core wall was extended over the porous area. The danger of a second break was perfectly obvious while the first repair was being made. The most suscinct statement of what caused the second is found in the testimony of R. J. Newell the defendant's chief engineer. (Tr. 497, App. First Br. 133-34)

Most of the matter contained in the Preliminary Statement (p. 4-19 Res. Br.) is a repetition of the matter presented in the eight errors assigned by respondent and answered in the foregoing text.

However, there are several other statements found in that part of respondent's brief that merit attention. For instance we read: (p. 9 Res. Br.) "Whenever in the construction of the north canal porous or unstable earth or material was encountered, it was removed. It was then replaced by fine selected material which was compacted."

Reference to the designated part of the record shows that *this was only a requirement of the plans.* There is not a word of testimony in the record showing that this requirement was met or the absence of available testimony on that point accounted for. (Mr. Boden Tr. 543-44)

The witness further testified he could not remember of seeing any notes indicating the charges for replacing porous material.

Again (P. 15 Res. Br.) in describing the second break we read:

> "The water emanated from a hole in the bank, an emanation took place in the natural earth of a hitherto dry canal bank, far removed from the seep concerning which appellants failed to establish any casual relation with the canal failure."

Instead of emanating from a *dry bank*, the bank, and the remaining base, was water soaked. Mr. Gordon testified on this point (Tr. 658-59, App. Op. Br. 129)

to the effect that the lower bank at that point was practically fluid mud.

Instead of being far removed from the seep on the Shaw place the second break was at a point immediately adjacent to the seeped area concerning which appellants witnesses testified about. (See Exhibit 82.)

RESPONDENT'S DISCUSSION OF CONSTRUCTION OF THE NORTH CANAL (Res. Br. 21)

Under this branch of their brief, counsel, with remarkable repetition (some 10 times) call attention to the fact (mentioned by Judge Fee) that the canal had stood for 11 years and sought to infer from that fact that there had been careful construction.

Considering what was found on July 9th, 1946, it was remarkable that the canal stood that long.

However, there had been two major breaks in the meantime. Sound construction does not anticipate a break of this nature every eleven years. Much less three major breaks in that time. When farmers pay som nineteen million dollars (Tr. 457) for an irrigation system it is to be expected that the structure will last at least until it is paid for.

Besides a large unlined canal carrying 450 second feet of water and absorbing water as shown by this record, is a constant menace to its own safety and good management required constant inspection by trained and skilful inspectors.

Undoubtedly defendant's engineers relied upon the fact that the structure had stood for eleven years and needed no further attention at this point.

The authorities cited by appellant (p. 106 Op. Br.) indicate that the evidence afforded by the fact that the structure stood for eleven years is very slight.

Respondent's witness Senger testified: (Tr. 780)

> "* * * We had a failure in a canal on the Idaho Power Co. system, where the thing had been operating twenty years."

Mr. Carter, appellants engineer, testified that percolation here might take years, and Mr. Gordon testified (Tr. 667)

> "A. I will agree that water will go through the formation, but at a very low rate.
> Q. And assuming that this canal was built in '34 and it went out in '46, it evidently did take a long time to percolate down.
> A. I can repeat that it percolated at a very slow rate."

When the court considers that the water was out of the canal for the non-irrigation season each year, the rate of percolation and its consequent results in this case robs the fact that the canal stood for eleven years before failing of any probative value.

COUNSEL'S DISCUSSION OF INSPECTION
(Res. Br. 24-26)

Counsel endeavor to sustain the trial court's finding of adequate inspection. This finding is square against the evidence. We have stated our position with authorities at pp. 3-4 supra, and these cases with the authorities in our first brief (p. 71-79) demonstrates the trial court's error in finding adequate inspection.

The fact that Mr. Pettett, the ditch rider, was an employee of the Owyhee Irrigation District (Tr. 757) failed to make an adequate inspection would not exonerate the defendant. We read in Restatement (Torts) 994, Section 366:

> "If a careful inspection would have disclosed the defect, and the risk involved therein, it is immaterial whether the failure to discover it is due to the possessor's failure to make an inspection or cause it to be made or by the inadequacy of an inspection made by him or by an independent contractor."

COUNSELS DISCUSSION OF OPERATION AND MAINTENANCE (Res. Br. P. 26)

Under this head, counsel discusses authorities on drainage which is not involved here. True, there is always involved the matter of seepage from canals and especially large canals like that involved here. This always involves danger, hence requires careful inspection and watching.

This is plainly shown by the testimony of Mr. Newell Tr. 491, App. Op. Br. 154, and Tr. 487-88, App. Op. Br. 154-55, and Tr. 507, App. Op. Br. 155 and the testimony of Mr. Carter 579-81 App. Op. Br. 156-57.

The assumed facts on which this testimony was given was established by the uncontradicted testimony of some six of appellants witnesses. Matherly, Tr. 125-29, App. Op. Br. 146-48, Hawkins Tr. 138-39, App. Op. Br. 148-49, 50, Hust Tr. 171-72, App. Op. Br. 150, Turner Tr. 187-89, App. Op. Br. 151, Ben Shaw Tr. 200, App. Op. Br. 153, and Judge Fee's Op. (93 Fed. Sup. 783-784).

COUNSELS DISCUSSION OF INVESTIGATION PRIOR TO REPAIR (Res. Br. 29)

We challenge that part of the Court's finding quoted by counsel "And that at the time the first repair was made, the defendant did not know the cause of the first

break and that defendant did not know of anything that would cause it to anticipate the occurrence of the second break."

The record virtually shouts with the cause of the first break. Carter (Tr. 571, App. Op. Br. 111), Gordon (Tr. 618, App. Op. Br. 112-113), Newell (Tr. 511-512, App. Op. Br. 113-114).

This testimony is a complete corroboration of the testimony of appellants witnesses. Merritt (Tr. 343, App. Op. Br. 109), Bouton (Tr. 426, App. Op. Br. 109), Bronken (Tr. 446, App. Op. Br. 110).

With these conditions in the canal depicted by this evidence, at the point of the first break, the same condition or one equally dangerous should have been anticipated in the canal 50 feet further downstream. Any type of inspection would have readily disclosed it.

It is hornbook law that defendant was charged with the knowledge that a reasonable investigation would have revealed.

No investigation of the area was at all made prior to repairing the second break. (Gordon Tr. 677-78, App. Op. Br. 134). The court's finding that there had been adequate inspection is directly opposed to the testimony from defendant's star witness.

COUNSELS DISCUSSION OF REPAIR
(Res. Br. 30-31)

The only part of this discussion that is material or justifies a reply is the language on Page 31 where we are criticised for contending that water was turned into the canal before the first break was repaired where we read: "That statement is likewise refuted by testimony diametrically opposed to the contention."

The principal testimony on this point comes from Mr. Gordon, Respondent's engineer in charge of the

repair. (Tr. 646-647, App. Op. Br. 130-31). We have called attention to this testimony at pp. 5-6 supra.

It shows that the bottom of the canal had been eroded away to a depth of from three feet at the point of the break and becoming less either way from the break for a distance of 350 feet up stream and 100 to 150 feet downstream.

COUNSELS DISCUSSION OF DEFENDANT'S LACK OF KNOWLEDGE (Res. Br. 32)

Here again, counsel lays great stress on the facts that there had been no break at this point during eleven years of the canal's existence. We have replied to that thought supra. (p. 8)

Counsel again tries to read out of the record the fact that the canal was built over a porous structure saying: (P. 33).

> "The fact renders ridiculous the repeated assertions of appellants that the North Canal was built over a loose and porous material incapable of holding water."

No one seriously contends that there was not a porous structure at the point of the break. For instance Gordon described the porous structures (Tr. 665):

> "A. Well, I would have to presuppose that there is something below this stratum which is more porous than the stratum itself.
>
> Q. Well, you would hit a stratum down there that was so porous that it was like quicksand?
>
> A. That is correct."

We have called attention to testimony of Newell and Carter (supra p. 2) on this point that the water seeping into the lower structure caused the canal's failure.

Since counsel has made innumerable references to

Judge Fee's opinion, we take the same liberty and point to his language: (93 Fed. Sup. 783).

> "However that may be, it is unquestionable that the defect could have been avoided by lining the canal with concrete at the particular point, building an inner core or a like structure upon the side and bottom of the canal, and finally by digging out the soft structure and permitting the canal to be lined with impervious material. Since the defect in the structure was not discovered at the time of construction, no such measures were taken. However, there is no doubt from the testimony which is now in the record that the defect could have been discovered, had proper tests been taken at the time of construction or afterwards. Competent engineers, however, must admit that the mere fact that these structures, which would not hold water, were buried four to six feet beneath the canal and over a space of two hundred to three hundred feet along the center line could have been discovered with proper test at the time of construction."

To this statement the court should have added that these porous structures were plainly visible in the walls and bottom of the canal and are present today except as remedied by the repairs made after the break. Again the court said: (p. 783).

> "The essential element of negligence would have been the release of a full head of water before inspection to insure stability in the canal."

That is exactly what happened regarding the second break and pleaded as one of the basis of negligence and is treated at pp. 65-69 Op. Br.

See testimony of Percey (Tr. 214-220, 222-223 App. Op. Br. 115-20, Hawkins Tr. 150-51, App. Op. Br. 120-122, Gordon Tr. 647, App. Op. Br. 132).

Continuing the court said: (93 Fed. Sup. 783).

> "If a single devise of building a core wall would have prevented the disaster, this necessity seems too plain for argument."

The records shows that a core wall would have prevented the break. (Newell Tr. 496-97, Bouten Tr. 427, Merritt Tr. 396)

No core wall was built, (Terhune Tr. 277) or if the three cubic yards spoken of by Boden (Tr. 541) was placed it was entirely ineffectual as a core. (Gordon Tr. 661)

Further the Court said: (Fed. Sup. 783)

> "Likewise, if a break would not have occurred had the canal been lined at this point with concrete, as it is in some other sections, efficient inspection would have disclosed the necessity."

Concrete lining is resorted to in short areas to prevent exactly what happened here. (Newell Tr. 470)

> "Where the canal was located high on the bank of a steep hillside so that a break would be especially dangerous, and the appearance of the formation was unfavorable, concrete lining was resorted to."

The record shows that there was concrete lining in the north canal both above and below the break and that the north canal was built on a hillside, some 200 feet above the level of the valley.

The court continued: (783-84)

> "As for the ideas that a defect was hidden does not comport with the respect which the Court has for the engineering profession to hold that such a situation, now hypothetically assumed, could not have been discovered and proper precautions taken against a break by thorough inspection during construction.
>
> The Court was not convinced that the attempted explanation of the government experts was valid. "*It was unquestionably proved that there were structures near the canal at the points which were pervious to water, and that these were saturated*

> *at the time of the breaks.* But the evidence did not disclose why or how the break happened eleven years after construction. Since the burden of proof lay on plaintiffs to establish cause and damage as a proximate result, no liability can be found in this state of the record. *In view of the nature of the duty to deliver water, resipsa loquitur does not apply.*"

The facts being as related by the Court, supra, it is clearly a case for the application of the res ipsa loquitur rule.

But aside from the force of the res ipsa rule the above facts, to which the court called attention, show negligence:

(1) In not building a core wall; (2) In not discovering patent defects in the structure (3) In not making adequate inspection (4) In releasing an excessive amount of water into the canal after the first break, with no inspection of the area damaged by the break, and particularly no inspection of the immediate area where the second break occurred.

The court correctly appraised the dangerous nature of the canal and appreciated the necessity of a high degree of care as evident from the quotation taken from *Suko vs Northwestern Ice Co.* 166 Ore. 557, 113 P. (2) 209, and *3 Kinney on Irrigation Sec.* 1669, P. 3069, found at page 791, *93 Fed. Sup.* and was satisfied that the defendant did not live up to the degree of care required as shown by his comment at P. 791-92 of 93 Fed. Sup. which we quote:

> "Here there was a stream of water—36 miles long—flowing 450 second feet of water in an earthen canal through a structure which was incapable of holding the force thereof."
> * * *
> "The defendant was handling a highly dangerous instrumentality in a position where the lands of plaintiffs were peculiarly exposed to peril, and

> was bound to exercise a degree of care proportionate to the injuries likely to result to others if the ditch did not hold the stream. When plaintiffs proved the collapse of the wall of the canal and the injuries suffered by him, he made out a prima facie case of negligence. 'A very high degree of danger calls for a very high decree of care, which, however, amounts to no more than ordinary care in such a case.' The defendant knowing the structures over which this canal was built at this point, was bound to make detailed engineering inspections from time to time while the canal was carrying a heavy load of water. There was no proper care taken, and the liability would be found by the Oregon courts in a case between private citizens."

The acts and omissions above criticised are the same acts and omissions relied upon by appellants to establish negligence.

The duty owed to appellants to deliver water is just as important in the eyes of the law, as was the duty not to trespass on the lands of these parties.

No distinction can be drawn in applying the same negligent acts between damages from trespass and damages for failure to perform a contract.

The authorities in our opening brief (pp. 75-79) answer the contention of counsel that they had no knowledge of the defects in this canal. As Judge Fee said, there was no defect in the canal that ordinary inspection would not have revealed.

COUNSELS DISCUSSION OF PROXIMATE CAUSE (Res. Br. 41)

We find it difficult to follow counsels argument. The proximate cause of appellants damage was the defendants failure to deliver water to appellant for irrigation. This failure is admitted. This failure arose from the negligent operation of the instrumentality defendant

relied upon to perform its contract. It is admitted that the instrumentality failed.

Counsel say (p. 44) that there is no causal connection between the seeped condition of the area and the ultimate failure of the canal. This argument, and the Court's finding based on this premise is contrary to the testimony of all the witnesses (Newell Tr. 487-88, App. Op. Br. 154-55 Tr. 507, App. Op. Br. 155) and Carter (Tr. 579-81, App. Op. Br. 156-157), and Mr. Newell gave the very pertinent testimony shown at Tr. 491, App. 154 when he testified that if the conditions existed he would have had it corrected.

> "Q. And you would have done that because you would have thought it would be necessary to preserve the ditch?
> A. That is correct."

COUNSELS DISCUSSION OF THE BURDEN OF PROOF (Res. Br. 49)

Here counsel attempts to defend the court's error in refusing to consider the doctrine of res ipsa loquitur. We think the Court's error resulted from the fact that these cases rest primarily in a breach of contract, and he overlooked the fact that he was holding us to the burden of proving defendant's negligence in failure to perform. Counsel labors under the same error. They attempt to hold us to the contract theory in the application of the res ipsa rule and to the tort theory in the application of the negligence rule.

We know of no rule that prevents the application of the res ipsa rule when negligence is an element to be established.

The nature of the case is immaterial. The rule grows out of the necessity of proving facts patently in defendant's knowledge and not available to the plaintiff

and has particular application to cases where negligence is involved.

The rule was applied in Oregon in *Esberg Cigar Co. vs City of Portland*, 55 Pac. 961, where a city water main broke damaging the plaintiff's goods and in *Buffums vs City of Long Beach* (Calif) 295 Pac. 540, Foltis vs City of New York 38 N.E. (2) 455, 153 A.L.R. 1222, both involving broken water mains.

If the rule is applicable where the offending instrumentality is a cast iron pipe laid under ground surely it is applicable to an open unlined canal carrying 450 second feet of water over a porous hillside structure of such construction that water seeped through the sides and bottom sufficiently to disintegrate the bed and foundation.

COUNSELS TREATMENT OF FORM OF APPELLANTS CLAIM (Res. Br. 60)

Counsel contends our relief is limited to the provisions of the Tort Claim Act (28 U.S.C. 921 et seq) in which negligence must be established.

This question had attention in the pre-trial proceedings held on Dec. 2nd, 1947, as shown by the record of that proceeding held on Dec. 2nd, 1947, beginning at P. 68 and again at P. 126. The pre-trial order (Tr. 54) recites:

> "The Court at the pre-trial conference allowed plaintiffs to amend their Complaint to plead in Contract under the provisions of the so-called Tucker Act (28 U.S.C., sec. 41, subsec. 20; 28 U.S.C., 250 et seq.) or under the Federal Tort Claims Act (28 U.S.C., 921 set seq.) or in the alternative. To the foregoing ruling by the Court the defendant objects."

Judge Fee carried the sense of this pre-trial order into his opinion (93 Fed. Sup. 779) where we read: (782)

> "And, since this is all that the plaintiff asks of the Government, whether on the theory of contract, tort based on contract or as a result of the duty established by the laws of the state upon one assuming to act as a common carrier of water to lands to which the water right is appurtenant, the same basis for recovery is laid."

In *Ettman vs Federal Life Ins. Co.* 137 Fed. (2) 121 we read: (127)

> "The Federal Rules of Civil Procedure, 28 U.S. C.A. following section 723c, govern pleading, practice and procedure in the courts of the United States. These rules contemplate that every litigant shall have a trial of his case upon its merits and in accordance with the evidence and the applicable law. Whether the Company assumed in its pleadings and upon the trial that it must prove an intent on the part of the insured to deceive is of no consequence. The evidence received was within the issues made by the pleadings, and it was the duty of the trial court to apply the proper rules of law to the fact situation."

Counsel argues that in some five of the claims there is a demand for more than $10,000 each and therefor in excess of the court's jurisdiction if considered under the Tucker Act. The answer to this is that having asked for and been granted the right to recover under either act, there would be a waiver of any excess over the jurisdictional amount.

The court will permit such a waiver and retain jurisdiction under the Tucker Act. *(United States vs Johnson,* 153 Fed. (2) 846, *Oliver vs United States* 149 Fed. (2) 727; *Hill vs United States* 40 Fed. 441)

The cases being otherwise cognisable under the Tucker Act, the court can render judgment up to $10,000 in each claim. The issues of damages having been retained for further hearing, a formal waiver of the excess claimed can be readily waived.

The matters discussed at Page 63 were decided against the United States and no appeal taken.

CONCLUSION

Having become, as Judge Fee determined (93 Fed. Sup), a common carrier of water, the liability of the defendant should be measured by the rule of liability in other common carrier cases, at least to the extent of showing that the loss for failure of performance was due to a cause beyond its control.

The court determined (93 Fed. Sup. 791) that:

"The defendant was handling a highly dangerous instrumentality" and recognized that "a high degree of danger calls for a very high degree of care. * * *"

This "very high degree of care" relates to keeping the water in the ditch or keeping the ditch in condition to retain the water.

The defendant employed this instrumentality in the performance of its obligation to the appellants. It is the nature of the instrumentality employed that measures the degree of care to be observed.

Having employed an instrumentality that called for a high degree of care, it was error to modify that requirement to one of "reasonable" care. (Finding No. 12-13 Tr. 95)

We urge that the record shows:

(1) That the great weight of the evidence is contrary to the Court's finding, (2) That the present judgment results in a miscarriage of justice; and that the judgment of dismissal should be reversed.

Respectfully submitted,

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